UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

UNITED STATES OF AMERICA

v. CASE NO. 8:08-cr-00330-T-30TBM

JOHN ROBERT MILLER

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MOTION TO HAVE ADDITIONAL COAST BANK BORROWERS RECOGNIZED AS CRIME VICTIMS PURSUANT TO THE CRIME VICTIM'S RIGHTS ACT

The Coast Bank of Florida borrowers listed on the attached Exhibit "A" (hereinafter "Borrowers") move this Court to be recognized as "victims" under the Crime Victim's Rights Act along with 104 Coast Bank of Florida borrowers who have previously moved to be so recognized. In support of this motion, these borrowers adopt the statements and arguments of those other borrowers and, in additional, state:

1. One of the Borrowers seeking to be recognized as a "victim" in this motion is Janis Stewart (hereinafter "Stewart"), who is referred to specifically in the Criminal Information and Plea Agreement.

2. Stewart, like the other Borrowers, is entitled to be recognized as a crime victim pursuant to 18 U.S.C. § 3771, which defines crime victims as those "directly and proximately harmed *as the result of* the commission of a federal offense . . . ." 18 U.S.C. § 3771(e)(emphasis added).

3. On September 18, 2008, during a hearing before this Court, Miller pled guilty to conspiracy to commit wire fraud, in violation of 18 U.S.C. § 3771, as provided for in the

Plea Agreement signed by the defendant on August 7, 2008.

4. In the plea agreement, Miller admitted to overcharging Janis Stewart by an extra point on the Coast Bank mortgage that she obtained. Miller specifically agreed in the plea agreement to the following overcharge of Ms. Stewart:

> In particular, on December 1, 2005, the defendant charged AML client Janis Stewart a mortgage brokerage fee amounting to two percent, rather than the standard one percent that would otherwise have been charged by AML, of the $333,000 loan made by Coast to enable Stewart to purchase real property and build a home in Rotonda West, Florida.

Miller Plea Agreement, ¶ 9. Miller and his coconspirator, Philip William Coon, then pocketed the extra one percent or $3,330.

5. Stewart was responsible for paying the extra $3,330, as shown in her Construction Loan Agreement. Paragraph J.1 states quite directly that Stewart is obligated to pay all of the criminally-inflated closing costs: "The Borrower shall pay, or provide payment for all costs of the closing of the Loan and all expenses incurred by the Lender with respect thereto . . . ." Attached as Exhibit "B" is Stewart's Coast Bank Construction Loan Agreement, which is typical of the agreements in this case.

6. Stewart was required by Coast Bank to execute "Borrower's Authorization of Closing Funds," which on its face indicates that closings costs were being paid out of the loan proceeds. Attached as Exhibit "C" is Stewart's "Borrower's Authorization of Closing Funds" involved in this case, and reflects this fact.

7. Finally, the loan closing statement for Stewart's loan, which is typical of the closing statements in this case, reflect closing costs, including the overcharged points, being paid out of the loan proceeds for which she was responsible. Attached as Exhibit "D" is the loan closing statement. The points (loan origination fee), including the extra point

overcharge which is the subject of the charges in this prosecution, paid to American Mortgage Link of $6,660, are identified on line 801. The total settlement charges including the points of $14,518 are identified on line 1400. The principal amount of the new loan of $333,000 is identified on line 202. The loan proceeds of $333,000 were allocated as follows: $14,518.00 to pay closing costs (line 502), $66,634.43 lot payment (line 507), $22,347.57 first draw to builder (line 603) and $229,500 remaining in the loan in progress account (line 506). Subtracting out the loan in progress, the amount disbursed at closing from the loan was $103,500, which included the extra point overcharge. Interest was charged by Coast Bank on the $103,500.00 from day one. Attached as Exhibit "E" is the note evidencing Stewart's interest obligation.

8. As a direct result of Miller's criminal conspiracy, Stewart became legally obligated to repay to Coast Bank and its successor, First Bank, $3,300 more than she would have otherwise have had to repay. She also had to pay interest on the $3,300 since the closing of the loan. All of the other Borrowers have suffered similar harms in similar amounts, the precise harm depending on the size of the loan (and the consequent overcharged points) that they became obligated to repay with interest.

9. Pursuant to the CVRA, a "crime victim" is defined, in relevant part, as "a person directly and proximately harmed as a result of the commission of a federal offense. . . " 18 U.S.C. § 3771(e).

10. The extra point skimmed by Coon and Miller reduced the amount remaining in the loan for construction of a home on the lot. Faced with a growing deficit as a result, the builder, CCI, filed for bankruptcy in February of 2007. No progress had been made on the construction of a home on the lot. Stewart continued faithfully making interest

payments on the loan (including the extra point) until June 1, 2007. Coast Bank was purchased by First Bank effective December 1, 2007 for $12,000,000. On or about March 17, 2008, First Bank filed a foreclosure action against Stewart seeking $112,853.34, the principal balance of $103,500.00 plus accrued interest since June 1, 2007. A copy of the foreclosure complaint without exhibits is attached hereto as Exhibit "F." Stewart has since entered into a confidential workout with First Bank involving the payoff of the mortgage and as a result now owns a nearly worthless lot in Charlotte County, Florida.

11. Stewart, like the other Borrowers, was directly and proximately harmed as a result of Miller's criminal offense by suffering the financial obligation to repay an additional $3,300 and interest on that amount since the closing of the loan.

12. Other borrowers suffered even more substantial harms. Sisters Linda M. Maggi and Kathleen Maggi, from whose primary residence mortgage Coon and Miller skimmed the extra point overcharge, lost their home at a foreclosure sale on April 9, 2007. Attached as Exhibit "G" is a copy of the certificate of title. The final summary judgment of foreclosure, attached hereto as Exhibit "H," includes the extra point overcharge and interest accrued thereon.

13. Another example of the harms caused by Coon and Miller's conspiracy comes from borrower Gloria Chaignet. In July 2005, she was contacted by a representative of CCI about an opportunity to build a home inexpensively. She was a single mother raising three sons on her own with minimal support from the boys' father. She signed loan documents like those signed by Stewart and the other Borrowers with the understanding that CCI was totally responsible to pay all closing costs and loan payments from the time of the mortgage closing until the Certificate of Occupancy was in her hands. This turned out not to be true

and she paid interest for many months on these costs, which were included in her loan. To make matters worse, Coast released large sums of money from the loan to CCI for events that never occurred on the property that Chaignet owned. In total, $82,000 was withdrawn from her LIP account, yet she still had an empty lot with no improvements on it. Communications from CCI stopped and Coast refused to release further information about her account. The result has been to leave Chaignet with debt that she may never be able to repay. Because of this debt, Chaignet now has great despair and intense nervousness, to the point of seeking medical attention to cope with it. She was forced to pay for her son's college not from the proceeds of the house that was to have been built, but from credit cards – which further compounded her indebtedness. Indeed, there were times when she lacked enough money to give her son lunch money for school.

14. Because of the direct financial harm suffered by the Borrowers from the conspiracy, they are entitled to rights under the Crime Victim's Rights Act. The Borrowers are specifically entitled to notice of all public proceedings regarding this offense, the right to attend all hearings regarding the offense, the right to be reasonably heard at any plea or sentencing of the offense, the right to reasonably confer with the Government regarding the case, the right to full and timely restitution, and the right to be treated with fairness and with respect for her dignity and privacy. 18 U.S.C. § 3771(a). As one example, as part of exercising her rights, Ms. Stewart seeks $3,300 plus interest paid on this amount in restitution from Miller and from his coconspirator Philip William Coon. The other Borrowers seek similar restitution as a result of their point overcharges.

15. The Borrowers could provide sworn affidavits and sworn testimony, corroborated by additional documentary evidence, to convincingly demonstrate all of the

foregoing, should the Court believe that such evidence was needed to reach an appropriate decision on whether they are "victims" of the conspiracy.

WHEREFORE, Borrowers request that the Court enter an order recognizing them as crime victims under 18 U.S.C. §3771.

MEMORANDUM OF LAW

a. The CVRA Creates Broad Rights for Crime Victims.

Borrowers are asserting their rights under the Crime Victim's Rights Act. The CVRA "was designed to be a 'broad and encompassing' statutory victims' bill of rights." *United States v. Degenhardti,* 405 F.Supp.2d 1341, 1342 (D. Utah 2005) (quoting 150 Cong. Rec. S4261 (daily ed. Apr. 22, 2004) (statement of Sen. Feinstein)). In the course of construing the CVRA generously, the Ninth Circuit observed: "The criminal justice system has long functioned on the assumption that crime victims should behave like good Victorian children – seen but not heard. The Crime Victims' Rights Act sought to change this by making victims independent participants in the criminal justice process." *Kenna v. U.S. Dist. Court for C.D. Cal.*, 435 F.3d 1011, 1013 (9th Cir. 2006). Accordingly, because the CVRA is remedial legislation, courts should interpret it "liberally to facilitate and accomplish its purposes and intent." *Elliott Industries Ltd. Partnership v. BP American Production Co.*, 407 F.3d 1091, 1118 (10th Cir. 2005).

Not only must the CVRA as a whole be interpreted liberally, but its definition of "crime victim" requires a generous construction. After reciting the definition at issue here, one of the Act's two co-sponsors Senator Kyl explained that "[t]his is an *intentionally broad definition* because all victims of crime deserve to have their rights protected . . ." 150 Cong. Rec. S10912 (Oct. 9, 2004) (emphasis added). The description of the victim definition as

"intentionally broad" was in the course of a floor colloquy with the other primary sponsor of the CVRA and therefore deserves significant weight. *See Kenna*, 435 F.3d at 1015-16 (discussing importance of CVRA sponsors' floor statements). The provision at issue here must thus be construed broadly in favor of Borrowers.

b. Borrowers are Victims of Miller's Crime Entitled to Rights Under the CVRA.

Under the CVRA, Borrowers are "crime victims" of defendant Miller's conspiracy, as they were "[persons] directly and proximately harmed as a result" of it. 18 U.S.C. § 3771(e). The CVRA must, of course, be interpreted consistent with its plain language. *See United States v. Serawop,* 505 F.3d 1112, 1120 (10th Cir. 2007). The straightforward way to read the statute is that the direct harm component requires the court to determine whether the defendant's crime was a but-for cause of harm to the person, while the "proximate harm" component requires the court to determine whether that harm was a reasonably connected consequence of the crime. These requirements are easily satisfied here.

The Seventh Circuit's decision in *United States v. Donaby*, 349 F.3d 1046 (7th Cir. 2003), further usefully illustrates the breadth of the statute.[1] In that case, the defendant robbed a bank, then damaged his stolen getaway car (a police vehicle). The district court

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[1] Similar illustrations can be found in *United States v. Vaknin*, 112 F.3d 579, 589 (1st Cir. 1997) (interpreting Mandatory Victims Restitution Act "victim" provision to require "but for causation" and a "causal nexus between the conduct and the loss [that] is not too attenuated"); *United States v.Checora*, 175 F.3d 782, 795 (10th Cir. 1992) (interpreting MVRA victim provision to find that sons of murder victim were "victims"; "[t]hey have been directly and proximately harmed as a result of their father's death because they have lost, among other things, a source of financial support").

awarded restitution to the police department for the damage under the MVRA. Interpreting the definitional language at issue here,[2] the Seventh Circuit explained that "but for the robbery, it is certain that this particular chase would not have occurred." 349 F.3d at 1053. Moreover, the court explained that direct-and-proximate harm is *not* limited "to the elements of the offense. . . . Thus, while fleeing the bank is not an element of bank robbery, the damage to [the police department] was a direct and proximate consequence of the specific conduct involved in robbing the bank." *Id.* Because the chase was a "direct and foreseeable consequence of the robbery," *Id.* at 1055, the police department was a victim of the crime – even though no police officer was anywhere close to the bank when it was robbed.

The Eleventh Circuit's decision in *United States v. Singer*, 152 Fed.Appx. 869, 2005 WL 2605400 (11th Cir. 2005), further illustrates how broadly the concept of "victim" is defined in a financial context analogous to that here. In that case, the defendant pled guilty to conspiracy to commit bank fraud, in violation of 18 U.S.C. § 371 and 1344. The conspirators in that case had fraudulently obtained information about the bank accounts of other persons, and then used that information to create fraudulent checks and identification cards. The conspirators then used the fraudulent checks and identification cards to purchase merchandise at stores in Florida. In affirming an award of restitution to the *merchants* who were affected by the *bank* fraud, the Eleventh Circuit explained that "the

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Donaby involved a restitution statute that contains an identical definition of "victim" that that found in the CVRA. *See* Paul G. Cassell, *Recognizing Victims in the Federal Rules of Criminal Procedure: Proposed Amendments in Light of the Crime Victims' Rights Act*, 2005 BYU L. Rev. 835, 857 ("The CVRA's definition of 'victim' is taken almost verbatim from the 1996 Mandatory Victims Restitution Act.").

targeted merchants were the primary victims of [the conspirators'] fraudulent scheme, and the district court did not err in ordering [Singer] to pay restitution for the merchants' *resulting* losses." *Id.* at *6 (emphasis deleted; second emphasis added). The Eleventh Circuit also noted that the definition of "victim" in the restitution statute (the MVRA) is "a person directly and proximately harmed as a result of the commission of an offense for which restitution may be ordered," *id.*, which is indistinguishable from the definition used in the CVRA.

A similarly broad approach to defining "victim" is found in *United States v. Hackett*, 311 F.3d 989, 992-93 (9th Cir. 2002). *Hackett* involved the question of who qualifies as a "victim" under the MVRA's "direct and proximate harm" language. Victor Hackett pled guilty to aiding and abetting methamphetamine manufacture. He was a frequent visitor to the residence of Shandy Felch. One day when Hackett was gone, Felch placed a jar of chemicals used to manufacture methamphetamine on a hot plate. The jar exploded, causing a serious fire in the home. In affirming a district court restitution award against Hackett to an insurance company that had insured the home, the Ninth Circuit recited the direct-and-proximate harm provision in the restitution statute. The Circuit then explained that an intervening cause is not an automatic barrier to restitution liability:

> The main inquiry for causation in restitution cases [is] whether there was an intervening cause, and, if so, whether this intervening cause was directly related to the offense conduct. Thus, the conduct underlying the offense of conviction must have caused a loss for which a court may order restitution. . . . Any subsequent action that contributes to the loss, such as an intervening cause must be directly related to the defendant's conduct.

311 F.3d at 992 (*citing and quoting United States v. Meksian*, 170 F.3d 1260, 1263 (9th Cir.

1999); *United States v. Gamma Tech Indus.*, 265 F.3d 917, 928 (9th Cir. 2001)). Applying those principles, the Circuit noted that "Hackett does not dispute that he helped acquire ingredients used in the manufacturing process. It was not unreasonable for the district court to conclude that Hackett's conduct *created the circumstances* under which the harm or loss occurred." 311 F.3d at 993 (emphasis added).

Applying these principles to this case, it is obvious that the Borrowers are "victims" of Miller's (and Coon's) crime within the broad definition of the CVRA. "But for" Miller's crime, the Borrowers would not have been charged an extra point on their loans. And Miller could obviously foresee that loss would result from conspiracy. The crime of conspiracy is a "specific intent" crime. Miller has pled guilty to "knowingly and willfully" conspiring to overcharge Coast Bank customers. Moreover, Miller obviously knew that the extra point that he and Coon were charging would come out of the pockets of others. He obviously "created the circumstances" which harmed the Borrowers– indeed, he directly harmed the Borrowers.

c. Whether Coast Bank is Also a Victim of the Crime Is Irrelevant to Whether the Borrowers are Victims of the Crime.

The conspiracy charge that Miller pled guilty to can be read to allege that Coast Bank is a "victim" of the offense. Whether this is so or not,[3] the fact remains that the Borrowers are *also* victims of Miller's (and Coon's) crime. As the *Donaby* case illustrates, a single case can obviously have more than one victim. Thus, in that bank robbery, not only were the tellers victims of the defendant's robbery, but so was the police department whose car was damaged in the resulting chase.

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3 The other Borrowers have previously argued that Coast bank is not truly a "victim." *See* Motion to have Coast Bank Borrowers Recognized as Crime Victims at p. 4.

d. Judge Kovachevich's Ruling Should Not Be Followed.

Borrowers acknowledge that this Court (per Judge Kovachevich) has already ruled that Coast borrowers are not "victims" of Mr. Coon's parallel offense. *See* Order, *United States v. Coon*, No. 8:08-CR-441-T-17MAP (Nov. 14, 2008). That Order, however, is conclusory. It is not binding in this case and, for the reasons argued above, Borrowers respectfully submits it is simply incorrect. Borrowers understand that an appeal of that decision will be filed with the Eleventh Circuit shortly.

In fairness to Judge Kovachevich, it appears that the Government and Coon may have misled her about the financial consequences of the crime in this case. In the *Coon* case, the plea agreement states: "The additional one percent charged as a result of the conspiracy did not affect the amount paid by the borrower as the builder/seller was responsible for the payment of all closing costs." Coon Plea Agreement at 18. That representation is not true, as the facts recounted above (and recounted by the Borrowers in *Coon* case) make clear. While the Borrowers did not have to pay cash at closing for the closing costs, there were placed "on the hook" for these amounts as they were rolled into the loan. In any event, the Miller Plea Agreement does not contain this language asserting that the amount paid by the Borrowers was unaffected. Therefore, there is an obvious factual distinction between the posture of this case and that case. Accordingly, Judge Kovachevich's ruling is not directly applicable here.

If there is some dispute about the facts of this case, Borrowers respectfully request an evidentiary hearing during which they could establish their financial losses from Miller's crime more fully.

CONCLUSION

For the foregoing reasons, Borrowers respectfully request that this Court enter an order pursuant to the Crime Victim's Rights Act finding that they are "victims" of Miller's offenses, along with the other similarly-situated borrowers, and that they are therefore entitled to exercise all of their rights under the CVRA, including their right to restitution. The borrowers also respectfully request that their motion be decided "forthwith," as is provided in the CVRA. See 18 U.S.C. sec. 3771(d)(3) ("The district court shall take up and decide any motion asserting a victim's right forthwith.").

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing on November 20, 2008, with the Clerk of Court using the CM/ECF system which will send a notice of electronic filing to Rachelle DesVaux Bedke, Assistant United States Attorney, (rachelle.bedke@usdoj.gov); Eduardo A. Suarez, Esq., (esuarez@suarezlawfirm.com),counsel for defendant; James E. Felman, Kynes, Markman & Felman, PA, (jfelman@kmf-law.com), counsel for Philip W. Coon; and a true and correct copy of the foregoing was furnished via regular U.S. mail to David Tremmel, Federal Probation Officer, Post Office Box 3905, Tampa, FL 33601.

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